Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan Umno Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–1740–08 OF 2013
BALIA YUSOF, LIM YEE LAN AND HAMID SULTAN JJCA
10 JULY 2015

Civil Procedure — Damages — Assessment of damages — Assessment by deputy registrar — High Court reversed finding of deputy registrar on assessment — Whether damages proven — Deputy registrar had audio-visual advantage of dealing and observing demeanour of witnesses — Whether High Court correct in disturbing assessment made by deputy registrar

The plaintiff had obtained judgment for the sum of RM37,127,471.60 and subsequently sued the defendant for RM31,160,295. However, the defendant filed its defence and further counterclaimed for damages and was later successful in its application to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980. The defendant made an application for the payment of RM37,127,471.60 ('encl 151') and the High Court ruled that the plaintiff was liable and ordered assessment of damages. The order of assessment of damages was affirmed by the Court of Appeal. In assessing damages, the deputy registrar was of the opinion that the defendant had not proven the damages. The defendant appealed to the High Court and subsequently, the High Court reversing the finding of the deputy registrar. The High Court judge ordered judgment for sum of RM37,127,471.60 and assessed damages in the sum of RM1,019,512. Hence, this appeal.

Held, allowing the appeal:

(1) The judgment for RM37,127,471.60 was bad in law and ought to be set aside at limine. The order to enter judgment for RM37,127,471.60 was erroneous as it was not consistent with the orders made in respect of encl 151 and the decision of the Court of Appeal. The deputy registrar had heard the witness and observed the demeanour. The deputy registrar had dealt with the issue of demeanour as well as competency of one of the witnesses and the lack of bona fide in another witness. The assessment procedure and the reasoning of the deputy registrar passed the acid test of reasonableness and it ought not to have been disturbed by the High Court judge (see paras 12–13).

[Bahasa Malaysia summary

Plaintif telah memperolehi penghakiman bagi sejumlah RM37,127,471.60 dan kemudiannya menyaman defendan bagi sejumlah RM31,160,295. Walau bagaimanapun, defendan memfailkan pembelaannya dan menuntut balas selanjutnya untuk ganti rugi dan kemudiannya berjaya dalam permohonannya untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan membuat permohonan bagi bayaran sebanyak RM37,127,471.60 ('lampiran 151') dan Mahkamah Tinggi memutuskan bahawa plaintif bertanggungjawab dan memerintahkan penaksiran ganti rugi. Perintah penaksiran ganti rugi disahkan oleh Mahkamah Rayuan. Dalam menaksir ganti rugi, timbalan pendaftar berpendapat bahawa defendan tidak membuktikan ganti rugi. Defendan merayu kepada Mahkamah Tinggi dan kemudiannya, Mahkamah Tinggi mengakas dapatan timbalan pendaftar. Hakim Mahkamah Tinggi memerintahkan penghakiman untuk sejumlah RM37,127,471.60 dan menaksir ganti rugi dalam jumlah RM1,019,512. Maka, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Penghakiman untuk RM37,127,471.60 adalah tidak betul di sisi undang-undang dan patut diketepikan limine. Perintah untuk memasukkan penghakiman untuk sebanyak RM37,127,471.60 adalah salah kerana ia tidak konsisten dengan perintah-perintah yang dibuat berkaitan lampiran 151 dan keputusan Mahkamah Rayuan. Timbalan pendaftar telah mendengar saksi dan memerhatikan perilaku. Timbalan pendaftar telah berurusan dengan isu perilaku dan juga kekompetenan salah seorang daripada saksi-saksi dan ketiadaan bona fide di dalam saksi lagi satu. Prosedur penaksiran dan alasan timbalan pendaftar lulus ujian asid kemunasabahan dan ia patut tidak dicampur tangan oleh hakim Mahkamah Tinggi (lihat perenggan 12–13).]

Notes

For cases on assessment of damages, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 2892–2919.

Cases referred to

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd (Civil Appeal No J-02(NCVC)(W)-963–05 of 2012 (23 January 2013)) (unreported) (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)

Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6; [2003] 1 CLJ 12, CA (refd)

Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd [2010] MLJU 1353; [2010] 9 CLJ 400, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No 22–28 of 2003 (High Court, Kuantan)

Gopal Sri Ram (Mohd Aznel bin Azaharudin, C K Lim and David Yii Hee Kiat with him) (Aznel & Assoc) for the appellant.

Bastian Vendargon (Toh Seng Soon, Wong Fook Yong, Ong Siew Wan and Toh Hwei Sze with him) (Toh & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff appeals against the decision of the High Court which set aside the order of deputy registrar in an assessment of damages proceeding. The appeal came up for hearing on 13 April 2015 and upon hearing we allowed the appeal and reinstated the order of learned deputy registrar dated 24 September 2012 which states:

(i) Bahawa Defendan telah gagal untuk membuktikan sebarang kerugian;

(ii) Bahawa taksiran gantirugi Defendan ditolak;

(iii) Bahawa kos dibayar oleh Defendan; dan

(iv) Bahawa Notis Untuk Mengemukakan (Kandungan 208) ditolak dengan kos.

My learned brother Balia Yusof bin Hj Wahi JCA and learned sister Lim Yee Lan JCA have read the judgment and approved the same. This is our judgment.

BRIEF FACTSEF FACTS

[2] The instant case and issue of damages has a chequered history. We do not wish to set out the entire facts as it has been adequately canvassed by the parties and also set out in the 20 page judgment of the learned trial judge. Much judicial time will be saved if the issues raised to encls 151 and 245 which relate to assessment of damages are dealt with in the judgment.

[3] The plaintiff had brought an action against Kerajaan Negeri Pahang and Pengarah Perhutanan Negeri Pahang vide in High Court Suit No 21–9 of 2002 and obtained judgment for the sum of RM37,127,471.60 out of the sum of RM32,723,906.60 claimed (Suit No 22–28 of 2003). Subsequently, the plaintiff sued the defendant in this action for RM31,160,295. The defendant filed defence and counterclaim. In the counterclaim the defendant sought

damages against the plaintiff and also attempted to claim the sum of RM37,127,471.60 which was the judgment sum obtained by the plaintiff in the High Court Suit No 21–9 of 2002 stated above.

[4] In Suit No 22–28 of 2003, the defendant then filed an application to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980 and succeeded leaving only the defendant's counterclaim to be tried. Without fixing the matter for trial, the defendant then made an application vide encl 151 to dispose of its counterclaim. The defendant's counterclaim reads as follows:

And the defendant counterclaims:

1.1. An order that the agreement dated 2.10.2000 is null and void.

1.2. In the alternative, an Order that the Agreement dated 2.10.2000 be rescinded.

1.3. An order that all benefits and/or profits to which the Plaintiff has obtained and/or will obtain either on its own and/or from any other parties based on and/or relying on and/or relating to the Agreement be forthwith paid to the Defendant.

1.4. Interest at the rate of 8% per annum on all the benefits and/or profits in the event that the Plaintiff fails to pay to the Defendant according to item 1.3 above.

2. Damages to be assessed.

3. Interest on Damages at the rate of 8% per annum from the date of the Writ until full settlement.

4. Costs.

5. Such further order and/or other relief that this Honourable Court deems fit and proper.

[5] The defendant's encl 151 reads as follows:

BENARKAN SEMUA yang berkenaan hadir di hadapan Hakim/ Penolong Kanan Pendaftar Dalam Kamar pada haribulan 18 Jan 2011 pukul pagi/petang untuk mendengar permohonan oleh pihak Defendan yang bernama di atas untuk perintah seperti berikut:–

1. Bahawa Defendan diberi kebenaran untuk memohon supaya soalan-soalan atau isu-isu fakta dan/atau undang-undang seperti yang dinyatakan selepas daripada ini yang berbangkit melalui pliding atau selainnya dikeputuskan oleh Mahkamah Yang Mulia ini menurut Aturan 33(2) Kaedah-Kaedah Mahkamah Tinggi, 1980;

2. Bahawa soalan-soalan atau isu-isu fakta dan/atau undang-undang yang berbangkit melalui pliding atau selainnya dalam tindakan ini dikeputuskan oleh Mahkamah Yang Mulia seperti berikut:–

(a) Bahawa Defendan hanya memberi kebenaran kepada Plaintif untuk mengerjakan pengeluaran saki baki kayu balak dan kayu pole bagi 9,000 ekar sahaja daripada tanah seluas 10,000 ekar yang diluluskan kepada Defendan oleh pihak berkuasa negeri;

(b) Bahawa Plaintif tidak memperolehi kebenaran daripada Defendan untuk mengerjakan pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2;

(c) Bahawa Perjanjian bertarikh 02/10/2000 adalah terbatal dan tidak sah dan/atau telah diberhentikan maka dengan demikian Plaintif adalah tidak berhak kepada sebarang faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif dengan bergantung dan/atau menggunakan Perjanjian bertarikh 02/10/2000 tersebut termasuk apa-apa tindakan guaman dan sebagainya;

(d) Bahawa Defendan adalah berhak kepada segala faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif dengan bergantung dan/atau menggunakan Perjanjian bertarikh 02/10/2000 tersebut;

Maka seterusnya, perintah-perintah lanjut seperti berikut diberikan:–

3. Bahawa Plaintif bayar kepada Defendan dengan serta merta amaun penghakiman tersebut berjumlah sebanyak RM37,127,471.60 dengan faedah keatasnya pada kadar 8% setahun mulai 31.12.2000 hingga penjelasan;

4. Bahawa faedah, manfaat dan/atau keuntungan yang diperolehi oleh Plaintif melalui kerja-kerja pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2 ditaksirkan dan dibayar dengan serta merta kepada Defendan dengan faedah ke atasnya pada kadar 8% setahun mulai tarikh writ saman sehingga penjelasan;

5. Kos permohonan ini dibayar oleh Plaintif kepada Defendan; dan

6. Lain-lain perintah dan/atau relif yang dianggap perlu dan sesuai oleh Mahkamah Yang Mulia ini bagi maksud dan tujuan permohonan ini.

[6] It is important to note that notwithstanding the defendant in encl 151 had, inter alia, asked for the payment of RM37,127,471.60, the High Court ruled that the plaintiff is liable and ordered assessment of damages, ie prayer two of the counterclaim only. That is to say the court in hearing encl 151 did not award the sum of RM37,127,471.60 but held that the defendant is entitled for damages to be assessed (see A/R p 961).

[7] The High Court order dated 16 June 2011 in respect of encl 151 is at pp 961 and 962, and the relevant part of the order read as follows:

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Perjanjian bertarikh 12/10/2000 adalah terbatal dan tidak sah dan/atau telah diberhentikan;

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa berkenaan dengan Tuntutan Balas Defendan terhadap Plaintif maka hanya tinggal isu gantirugi sahaja untuk taksiran;

DAN ADALAH AKHIRNYA DIPERINTAHKAN bahawa kos permohonan ini dijadikan kos dalam kausa.

[8] On the defendant's appeal to the Court of Appeal, the High Court order on assessment of damages was affirmed, and the appeal was dismissed.

[9] The broad grounds of the Court of Appeal (A/R 725) in respect of encl 151 read as follows:

Unanimous decision of this Court.

We thank counsel for their submissions.

We dismiss the appeal for the following brief reasons:–

(1) Although the learned High Court Judge had found that the agreement dated 2.10.2000 was void and unenforceable, the learned High Court Judge went on to make an Order that the Respondent's counterclaim be allowed and for damages to be assessed.

(2) The Respondent's counterclaim is not dependent on the agreement dated 2.10.2000 which was held to be void. The Respondent's counterclaim was based on the fact that the Appellant had harvested timber in an area known as Block A2 for which the respondent had never given its consent. The grant of such relief to the Respondent was covered by question at paragraph 2(d) of the Summons-in-Chambers dated 23 December 2010. Therefore the contention of the Appellant that damages cannot be awarded in respect of a void contract cannot be upheld in this case.

(3) We accordingly dismiss the appeal with costs.

Costs is fixed at RM30,000 payable to the Respondent. Deposit to be refunded.

[10] It is crucial to note that the plaintiff did not file any cross-appeal in respect of encl 151, and in respect of other prayers which the High Court did not grant, in particular the sum of RM37,127,471.60.

[11] Upon the decision of the Court of Appeal, the matter went before the deputy registrar for assessment of damages. The deputy registrar ruled that the defendant had not proved the damages according to law. The order of deputy registrar dated 24 September 2012 (AR – pp 772 and 773) in particular reads as follows:

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Defendan telah gagal untuk membuktikan jumlah kerugian yang dialami atau manfaat yang telah diperolehi oleh Plaintif hasil dari perjanjian tersebut dan seterusnya tuntutan Defendan untuk taksiran gantirugi ini ditolak dengan kos.

[12] Against the order of the deputy registrar the defendant appealed to the judge in chambers vide encl 245, the subject matter of the instant appeal. The learned trial judge reversed the finding of the deputy registrar and ordered judgment for the sum of RM37,127,471.60 and reviewed the evidence before the learned deputy registrar and assessed damages in the sum of RM1,019,512. The relevant parts of the order dated 4 July 2013 read as follows:

> DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa selaras dengan Perintah Mahkamah bertarikh 16.06.2011 melalui Saman Dalam Kamar bertarikh 23.12.2010 (Lampiran 151) Responden/ Plaintiff bayar kepada Perayu/Defendan amaun penghakiman dalam Mahkamah Tinggi Malaya di Kuantan Guaman No MT 21-9- Tahun 2002 berjumlah sebanyak RM37,127,471.60 dengan faedah ke atasnya pada kadar 8% setahun mulai 31.12.2000 sehingga penyelesaian.
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> DAN ADALAH JUGA DIPERINTAHKAN bahawa Responden/Plaintif bayar kepada Perayu/Defendan gantirugi yang ditaksirkan bagi kerja-kerja pengeluaran saki baki kayu balak dan kayu pole dari blok yang lebih dikenali sebagai Blok A2 berjumlah sebanyak RM1,019,512.00 dengan faedah ke atasnya pada kadar 5% setahun mulai 27.03.2003 sehingga penyelesaian.
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> (i) From the factual matrix and history of this case, it is clear that the order to enter judgment for RM37,127,471.60 is erroneous on the face of record as it was not consistent with the orders made in respect of Enclosure 151 and the decision of the Court of Appeal which we have dealt with earlier. In consequence the judgment for RM37,127,471.60 is bad in law and ought to be set aside at limine.

DECISION OF THE COURT

[13] We have read the appeal records and the able submissions of learned counsel. After giving much consideration to the submissions of learned counsel for the plaintiff, we are of the view that the appeal must be allowed. Our reasons, *inter alia*, are as follows:

(a) the only issue left is the order relating to assessment of damages. In this regard, it is well settled that the High Court in hearing an appeal from a decision of deputy registrar relating to assessment of damages must be slow to disturb the finding of facts and assessment of damages more so when the deputy registrar had heard the witness and observed the demeanour. Support for the proposition is found in a number of cases, to name a few are as follows: (i) *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6; [2003] 1 CLJ 12 (CA); (ii) *Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2010] MLJU 1353; [2010] 9 CLJ 400; (iii) *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC); (iv) *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; and

(b) we have gone through the notes of evidence and the grounds of the learned deputy registrar at pp 767–771 of the appeal records where she

had dealt with the issue of demeanour as well as competency of one of the witnesses and the lack of bona fide in another witness. On the facts of the case, we take the view that the assessment procedure and the reasoning of the learned deputy registrar passed the acid test of reasonableness and it ought not to have been disturbed by the learned High Court judge (see *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* (Civil Appeal No J-02(NCVC)(W)-963–05 of 2012 (23 January 2013)) .

[14] For the reasons stated above, the appeal is allowed and the order of the High Court dated 4 July 2013 is set aside. The order of the deputy registrar dated 24 September 2012 is reinstated. The defendant to pay the plaintiff's agreed costs of RM10,000 and deposit to be refunded.

Appeal allowed.

Reported by Kohila Nesan